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No. 92-505

In the Supreme Court of the United States

OCTOBER TERM, 1992

HENRY G. BARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the "exculpatory no" exception to 18 U.S.C. 1001 should relieve petitioner of responsibility for false statements he made as part of his application for employment.

2. Whether the government coerced petitioner's false statements, thus relieving him from liability under Section 1001, because he would not have been hired as an assistant to the Attorney General if he had stated that he used cocaine.

3. Whether the district court properly departed upward from petitioner's Sentencing Guidelines offense level because he held a high-ranking position of public trust.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 963 F.2d 641.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1992. A petition for rehearing was denied on June 24, 1992. Pet. App. 47a. The petition for a writ of certiorari was filed on September 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted on two counts of making false statements (18 U.S.C. 1001); one count of possessing cocaine (21 U.S.C. 844); and one count of conspiring to commit that offense (21 U.S.C. 846). He was sentenced to 16 months' imprisonment, to be followed by two years' supervised release, and was fined $2,500. The court of appeals affirmed. Pet. App. 1a-31a.

1. The evidence at trial showed that petitioner, a former assistant to the Attorney General, twice lied in applications connected with his employment when he denied having used cocaine within the preceding five years.

On September 6, 1988, petitioner began working at the Department of Justice. Pet. App. 3a. Because his duties involved work with the intelligence communities, including briefing the Attorney General on Foreign Intelligence Security Act cases, he was granted a temporary security clearance pending completion of a full-field background investigation. As part of his background investigation, petitioner was required to answer a Questionnaire For Sensitive Positions, known as a Standard Form 86 (SF-86). Petitioner completed the form six days after beginning work at the Department. Pet. App. 4a.

In response to the SF-86 question whether he "now use[d] or suppl[ied], or within the last 5 years, have you used or supplied marijuana, cocaine, narcotics, hallucinogenics, or other dangerous or illegal drugs," petitioner checked the "no" box on the form. He also signed the SF-86 and certified that his answers were true. Pet. App. 4a.

On November 1, 1988, an FBI agent interviewed petitioner in connection with his background investigation. The agent went over the questions on the SF-86 with petitioner, including whether he had used illegal drugs. Petitioner responded that he had not done so. Pet. App. 4a-5a. In granting a final security clearance to petitioner, the Department of Justice's security officer relied on the statements petitioner made to the agent in his interview. *Id.* at 5a.

After petitioner left the Department of Justice in May 1989, a grand jury investigating drug use by public officials in Pennsylvania learned that petitioner had used cocaine between 1984 and 1988, and at least once in 1989 during his employment at the Department of Justice. As a result of that information, petitioner was indicted.

At petitioner's trial, then-Attorney General Richard Thornburgh testified that, had he known of petitioner's cocaine use, he would not have hired petitioner. The Department of Justice's security officer testified that he would not have approved either petitioner's temporary or final security clearances had he been aware of petitioner's cocaine use. Five witnesses testified that they had used cocaine with petitioner a number of times from 1984 through 1989. Pet. App. 5a, 13a-16a.

2. Petitioner was sentenced under the Sentencing Guidelines. The district court determined that there was an aggravating circumstance that the Sentencing Commission had not considered, namely, that petitioner had held a high-ranking position within the Department of Justice and that criminal activity by a public official holding such an office tends to erode public confidence in government. The district court therefore found that an upward departure of four levels from level 8 was warranted. The new offense level of 12 had a range of 10 to 16

months' imprisonment. The court sentenced petitioner to concurrent terms of 16 months' imprisonment on the two false statement counts, and 12 months' imprisonment on the two cocaine counts. Pet. App. 6a, 25a-26a.

3. On appeal, petitioner argued, *inter alia*, that his false denials of drug use were excused by the "exculpatory no" exception to Section 1001. After canvassing other courts of appeals' approaches to the exculpatory no rule, the court held that, "given the facts of this case, [petitioner] would not be able to invoke this doctrine, as it has been interpreted in other circuits, as a defense to the violations of 18 U.S.C. § 1001." Pet. App. 10a.[1] The court explained that "[t]he policy underlying the judicial creation of the 'exculpatory no' doctrine, that of limiting the government's ability to coerce individuals suspected of wrong-doing into self-incrimination during the course of governmental investigations, certainly would not be advanced through protecting persons from prosecution under § 1001 who, like [petitioner], make false statements in connection with their quest for employment." Pet. App. 11a.

Petitioner also unsuccessfully challenged the district court's four-level upward departure at sentencing. Petitioner argued that the basis for the departure already had been taken into account by Section 3B1.3 of the Guidelines, which provides for an increase of two offense levels "[i]f the defendant abused a position of public or private trust * * * in a manner that significantly facilitated the commission or concealment of the offense." The court of appeals concluded that Section 3B1.3 did not

[1] Because the court found that the doctrine would not be applicable in this case, it declined to decide "whether the doctrine is viable under other circumstances." Pet. App. 10a.

relate to petitioner's circumstances. 963 F.2d at 655.[2] The court then went on to reject petitioner's challenge to the district court's determinations that he held a high public office, that criminal activity by persons holding such offices erodes public confidence in government, and that an upward departure was therefore warranted. *Ibid.*[3]

ARGUMENT

1. Petitioner's principal contention (Pet. 7-13) is that the Court should use this case to determine the validity and scope of the "exculpatory no" exception to Section 1001. Although we agree with petitioner that the lower courts have not spoken with one voice in this area, we do not believe this unusual case provides an appropriate occasion on which to resolve the questions the petition discusses.

By its terms, Section 1001 broadly reaches "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and willfully * * * makes any false, fictitious or fraudulent statements or representations." Section 1001 was designed to protect "the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described" in the statute. *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941). This Court has rejected "narrow, technical" constructions of this language, recognizing the "sweeping, every-day language" of the statute. *United States* v.

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[2] The appendix to petitioner's certiorari petition omits most of that portion of the court of appeals' opinion published at page 655 of 963 F.2d.

[3] The court of appeals also rejected several other claims that petitioner raised below, none of which he renews here.

Rodgers, 466 U.S. 475, 480 (1984); see *United States* v. *Bramblett*, 348 U.S. 503, 509-510 (1955) (explaining, in a case under Section 1001, that "criminal statutes are to be construed strictly," but "this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature").

Notwithstanding the broad language of Section 1001, several courts of appeals, following the lead of the Fifth Circuit in *Paternostro* v. *United States*, 311 F.2d 298, 305 (1962), have recognized an "exculpatory no" exception to Section 1001. Under that exception, simple negative, oral responses denying criminal liability are not "statements" within the meaning of Section 1001. See, *e.g.*, *United States* v. *Cogdell*, 844 F.2d 179, 182-185 (4th Cir. 1988); *United States* v. *Bedore*, 455 F.2d 1109, 1110-1111 (9th Cir. 1972); *United States* v. *Tabor*, 788 F.2d 714, 717-719 (11th Cir. 1986); see also *United States* v. *Chevoor*, 526 F.2d 178, 182-184 (1st Cir. 1975) (suggesting in dictum that the doctrine would apply in an appropriate case), cert. denied, 425 U.S. 935 (1976). Several other courts of appeals—like the court below—have discussed the "exculpatory no" rule with varying degrees of approval, but have not explicitly adopted or rejected it. See, *e.g.*, *United States* v. *Steele*, 933 F.2d 1313, 1319-1322 (6th Cir.) (en banc), cert. denied, 112 S. Ct. 303 (1991); *United States* v. *Cervone*, 907 F.2d 332, 342-343 (2d Cir. 1990), cert. denied, 111 S. Ct. 680 (1991); *United States* v. *King*, 613 F.2d 670, 674-675 (7th Cir. 1980); *United States* v. *Fitzgibbon*, 619 F.2d 874, 876-881 (10th Cir. 1980); *United States* v. *White*, 887 F.2d 267, 273-274 (D.C. Cir. 1989).

As petitioner points out, the courts of appeals do not all apply the same test in determining whether a false statement falls within the exception. For example, the

Second Circuit has stated that, if the exception exists, it does not apply to "any statement beyond a simple 'no.'" *United States* v. *Capo*, 791 F.2d 1054, 1069 (1986), vacated, 817 F.2d 947 (1987); see *United States* v. *King*, 613 F.2d 670, 674-675 (7th Cir. 1980) (noting that the exception is "very limited" and applies only "to simple negative answers, without affirmative discursive falsehood" (citation omitted)). The Ninth Circuit in *United States* v. *Medina de Perez*, 799 F.2d 540, 543-546 (1986), adopted a more elaborate test, holding that the "exculpatory no" exception is unavailable unless (1) the statement is unrelated to a claim against the government; (2) the declarant is responding to a government inquiry; (3) the statement does not impair the basic functions of the agency; (4) the inquiry is investigative, rather than routine and administrative; and (5) a truthful answer would have been incriminating. The Fourth and Eighth Circuits have followed that course. See *United States* v. *Cogdell*, *supra* (adopting that test in the Fourth Circuit); *United States* v. *Taylor*, 907 F.2d 801, 803-807 (8th Cir. 1990) (adopting that test). Although most cases are likely to be decided the same way under either test, there are cases in which convictions have been reversed under the Ninth Circuit test that probably would have been affirmed under the "simple no" test suggested by courts such as the Second and Seventh Circuits. See, *e.g.*, *Medina de Perez*, 799 F.2d at 541-542 (defendant falsely stated that she had borrowed a truck from a friend and driven it to Mexico to go shopping); *United States* v. *Equihua-Juarez*, 851 F.2d 1222, 1224 (9th Cir. 1988) (defendant gave false name to Border Patrol officer); *United States* v. *Myers*, 878 F.2d 1142, 1143-1444 (9th Cir. 1989) (defendant falsely stated that he flew an

airplane into prohibited airspace because he lost his contact lenses while in flight).

Although the validity and scope of the "exculpatory no" exception may warrant review by this Court in an appropriate case, we do not believe this is that case. As the court of appeals emphasized, the policy on which the exception rests—"limiting the government's ability to coerce individuals suspected of wrong-doing into self-incrimination during the course of governmental investigations"—would not be promoted by insulating applicants for government jobs from liability for false statements they make "in connection with their quest for employment." Pet. App. 11a. Thus, whatever the validity of the rule in cases like *Paternostro*—where the defendant answered "no" in response to questions such as "[h]ave you ever received from any bagman * * * any moneys for other than your police salary or special detail?" (311 F.2d at 301 n.3)—the "exculpatory no" exception ought not apply to false statements made to obtain a job. To our knowledge, no court of appeals has ever applied the "exculpatory no" exception to invalidate a conviction in such a situation—and certainly none has done so where, as here, the false statements were relevant to securing employment in a position of public trust. Thus, as the court of appeals stated, petitioner "would not be able to invoke this doctrine, as it has been interpreted in other circuits." Pet. App. 10a.

2. Relying on cases holding that a government employee may not be compelled to give incriminating information on the threat of losing his job, *e.g.*, *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973), petitioner argues (Pet. 13-15) that the government improperly coerced his false statements. Petitioner's reliance on those cases is misplaced,

because petitioner was not fired for invoking his right against compelled self-incrimination.

As petitioner notes (Pet. 12), the government may compel its employees to answer questions relevant to their positions or performance, so long as the answers may not be used against the employee in a subsequent criminal prosecution. *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 809 (1977). But petitioner did not simply invoke his privilege against compelled self-incrimination on the SF-86 form or in his interview with the FBI agent. Instead, he chose to lie. It is settled that while a person has a constitutional privilege against compelled self-incrimination, he has no constitutional right to give false statements. *Bryson* v. *United States*, 396 U.S. 64, 72 (1969) ("[a] citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood"). Petitioner could have given truthful answers, or he could have invoked his privilege against compelled self-incrimination; instead, he chose to give false responses. Nothing prevents him from being prosecuted for that choice.

3. Finally, petitioner argues that the district court erred by departing upward from his Guidelines sentencing range.

As both courts below found, an upward departure was warranted because petitioner "held a high ranking position with the Department of Justice" and "criminal activity by public officials tends to erode public confidence in government." Pet. App. 26a. Petitioner had a particularly sensitive position within the Department of Justice. He worked directly under the Attorney General and "served as a liaison to various law enforcement agencies." *Ibid.* Thus, he "was responsible for reviewing

sensitive and classified information related to criminal and intelligence matters" while he was using cocaine and concealing that use from the government. *Ibid.* Since the Sentencing Commission did not take those circumstances into account in formulating the Guidelines, it was appropriate for the district court to invoke those factors in deciding to depart from petitioner's presumptive Guidelines sentencing range. 18 U.S.C. 3553(b).

The district court reasoned, and the court of appeals agreed, that Sentencing Guidelines § 3B1.3, which deals with abuse of a position of trust, does not apply to petitioner because that section deals with offenses in which the defendant actually uses his position of trust in furtherance of the crime. That analysis is correct. Section 3B1.3 states in pertinent part that "[i]f the defendant abused a position of public or private trust * * * in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels." The commentary to that section emphasizes that it is applicable only when "[t]he position of trust * * * contributed in some substantial way to facilitating the crime." Sentencing Guidelines § 3B1.3, Application Note 1. Adjusting a sentence because the defendant has misused a position of trust to further an offense is quite different from adjusting a sentence because of the defendant's high-ranking position in government, and particularly in the criminal justice system. The sentencing court was therefore entitled to use that factor, which the Sentencing Commission had not incorporated into the Guidelines through Section 3B1.3 or otherwise, to justify an upward departure in petitioner's sentence.[4]

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[4] Petitioner also argues (Pet. 16) that Sentencing Guidelines § 5H1.5 states that employment does not provide a basis for depar-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ture from the Guidelines range. But § 5H1.5 says that an "employment *record*" generally is not a basis for a departure.